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No. 07-556

Supreme Court, U.S.
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In The Supreme Court of the United States

ALFONSO MORALES and
DAVID KOLATSKI,

Petitioners,

v.

ARTHUR JONES, MONICA RAY
and CITY OF MILWAUKEE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. THE PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE LOWER COURTS ARE APPLYING THE "OFFICIAL DUTIES" TEST SET OUT IN *GARCETTI* TOO BROADLY

Lieutenant Morales and Detective Kolatski have failed to demonstrate that the lower courts have misunderstood and misapplied the "official duties" test so that public employee speech which should be protected under the First Amendment is not. In support of their petition, they have really argued only that the seventh circuit incorrectly decided the question in this appeal. They have not cited to nor argued about any court reaching any different conclusion about the application of the "official duties" test in a factually-similar context. Just as significantly, they have not even shown that the seventh circuit misunderstood or misapplied the test in concluding that most of their speech is not entitled to protection by the First Amendment.

In *Garcetti v. Ceballos*, ___ U.S. ___, 126 S.Ct. 1951, 1960, 164 L.Ed.2d 689 (2006), this Court established that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." While not in that case having the occasion to "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for

serious debate," this Court did explain that mere job descriptions should not govern the determination, that the question "is a practical one," and that the lower courts must determine those "duties an employee actually is expected to perform." *Id.*, 126 S.Ct. at 1961-2.

The only case other than their own to which Morales and Kolatski make reference is *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006). That case does not, however, represent an application of the "official duties" test that conflicts, or is even inconsistent with the analysis or conclusion reached by the seventh circuit in this case. It in fact represents merely a consistent application of the test but under a very different set of factual circumstances that account for the opposite conclusion about First Amendment protection for the employee's speech.

In *Freitag*, the ninth circuit addressed a First Amendment claim by a female prison guard who had "sent a letter to California State Senator Richard Polanco in which she alleged that she and other female correctional officers were regularly subjected to sexually abusive behavior in the SHU [Secure Housing Unit] and that supervisors failed to respond adequately to her complaints regarding inmate conduct" . . . [and also asserted] that her disciplinary reports either were ignored completely or were not acted upon in sufficient time to permit the disciplining of inmates." *Id.*, 468 F.3d at 534. She wrote a second letter to the state senator describing other mistreatment she had suffered at the hands of staff

and inmates. *Id.* She also cooperated and communicated with the state's inspector general's office in an investigation of these matters prompted by her correspondence with the state senator. *Id.*

Upon those particular facts, the ninth circuit correctly concluded that with respect to Freitag's communications with the state senator and the inspector general's office, she did not speak as a part of her official duties. *Id.*, 468 F.3d at 545. "It was certainly not part of her official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace." *Id.*

Making a "practical" inquiry here, as directed by this Court in *Garcetti*, among the duties a state prison guard is not "expected to perform" is a complaint to elected state officials and communication with outside investigators about sexual harassment and improper supervision in the prison. *Garcetti*, 126 S.Ct. at 1961, 1962. As a practical matter, a guard is hired to guard the prisoners, and not manage prisons. Recounting unheeded complaints about inmate harassment, however, is not a part of those duties which the public would expect prison guards to perform, much less expect them to have to perform. This is the stuff of citizen's complaint to his or her elected officials.

By contrast, in recounting the events of the arrest to Detective Link, and later disclosing Mullarkey's

fantastic (and later disproven) allegations against Chief Jones and Deputy Chief Ray to Morales, Kolatski was engaged in one of his official tasks. The same is equally true for Morales when he repeated Mullarkey's allegations as well as various other incidents in the course of the investigation to the prosecutor as a part of the offered explanation for the absence of the "pedigree report." Parenthetically, the same would be true for Kolatski's initial conversations involving Mullarkey about which the petitioners erroneously make argument in their petition. As reflected in an earlier decision by the district court, it concluded upon the defendants' summary judgment motion "that Kolatski's verbal exchange with Mullarkey" did not fall within the category of speech about a matter of public concern and was unprotected. Petitioners' Appendix, p. 83. Kolatski did not appeal that decision and therefore has waived any argument that this particular speech should be afforded any First Amendment protection.

As to Kolatski's statements to Link about Vincent Ray's arrest and Kolatski's subsequent recounting to Morales of Mullarkey's claims, as even the district court described it before this Court had decided *Garcetti*, these were "communications essential to a complete and objective investigation of Vincent Ray's arrest" and "essential to a complete and objective investigation in the possible criminal activity of Chief Jones and Deputy Chief Ray." Petitioners' Appendix, p. 83. Engaging in a "practical" inquiry here, as directed by this Court in *Garcetti*, among the duties a

police officer "is expected to perform" is the complete and objective investigation of criminal activity, either in a particular case to which they have been assigned (here, Vincent Ray's arrest) or in a significant matter demanding attention and police action (here, allegations against the chief and deputy chief). *Garcetti*, 126 S.Ct. at 1961, 1962.

Though in testimony from the officers and chief it was made clear that a mere police officer would not be in a position to "act upon" allegations against the chief and deputy chief, that does nothing to establish that the public would expect a police officer to simply ignore such claims. Wisconsin law in fact prescribes that an officer "may arrest a person" when, among other things, the officer has "reasonable grounds to believe that *the person* is committing or has committed a crime." Wis. Stats. § 968.07(1)(d). There was no testimony or other evidence, furthermore, that any rule of the Milwaukee Police Department actually prohibits a mere police officer from "acting upon" either reported or observed criminal misconduct by a superior. Surely the public would expect Kolatski or Morales to arrest or even use force against any superior who might psychotically execute a citizen. Surely the public would have expected Morales or Kolatski to have stopped their captain or lieutenant if they had observed one of those superiors driving drunk on duty while they were driving with Detective Link from Mullarkey's establishment.

The public might expect these officers not to handle Mullarkey's allegations alone. Such action in

and of itself might lessen the proper exercise of authority in the chain of command of a quasi-military organization like a police department. Furthermore, there would be concerns that a subordinate would be too conflicted in his or her interests in conducting an investigation of a high-ranking superior officer.

That, however, does not equal a conclusion that a police officer, charged generally with enforcing the laws of his or her state and municipality, does or should take no official action with respect to a superior, even a high ranking one, in reporting alleged criminal conduct by the official. The practical answer to this question is that the public would expect the officer to act properly upon a serious allegation and must investigate or ask others properly situated to investigate such a claim. That is what both Kolatski and Morales ultimately did here.

The argument by Kolatski and Morales that the seventh circuit's reference to the police department's rule mandating officers "to report all potential crimes" erroneously makes a job description into the acid test of whether some action is part of the officers' "official duties." *Morales v. Jones*, 494 F.3d 590, 598, 600 (7th Cir. 2007) (Petitioners' Appendix, pp. 15, 21). Their argument misses the mark for this Court was concerned in *Garcetti* that "employers can restrict employees' rights by creating excessively broad job descriptions." *Garcetti*, 126 S.Ct. at 1961. That problem does not exist here. The people of Milwaukee would expect their police department to direct its officers to obey a rule like this; they would not want a

department to direct officers that they are to ignore crimes. By the same token, and admittedly using an extreme example, they would not expect police officers to be directed by employer policy to collect all local trash and to file reports about such activities. The appellate court below neither relied upon this rule exclusively to determine that the officers made these statements as part of their "official duties" nor did it rely upon a policy that constituted an overreaching attempt by a municipal employer to deprive its employees of legitimate First Amendment protection. Police officers legitimately should be directed to report crimes and the public would expect if not demand this.

Kolatski recounted the events of Vincent Ray's arrest to Link and there can be no doubt that such speech was a part of his official duties. Kolatski later recounted Mullarkey's allegations to Morales who had been assigned the Vincent Ray investigation and who was going to take the paperwork relating to his arrest to the prosecutor. "Kolatski had a duty to apprise Morales of any information pertinent to the investigation [of Vincent Ray]." *Morales*, 494 F.3d at 597 (Petitioners' Appendix, p. 14).

As reflected in the arrest report, the officers arrested Vincent Ray in part on a charge of "bail jumping." R.125:6, p. 1 (Ex. 6, Arrest Report Relating to Vincent Ray, p. 1). The Wisconsin Statute cited in the arrest report, that is, Wis. Stat. § 946.49, makes it a crime for a person who "*intentionally* fails to comply with the terms of his or her bond. . . ." Wis. Stat. § 946.49(1) (emphasis supplied). The element of

intent in the statute requires a showing that a criminal defendant knew the terms of his or her bond and knew that his or her actions did not comply with those terms. *State v. Taylor*, 226 Wis. 2d 490, 502, 595 N.W.2d 56 (Wis. App. 1999), *rev. den.*, 228 Wis. 2d 174, 602 N.W.2d 760 (1999). Not that the statement that Link took from Vincent Ray contained any mention of it, but it would have been important, if possible, for these officers to explore whether Vincent Ray would state that he had been in his sister's presence or, for that matter, in the presence of Chief Jones, and that one or both of them had informed him of open warrants, and, perhaps, that they had told him that such matters "would be taken care of" without him having to formally and voluntarily turn himself in to police authorities. R.125:6, pp. 4-5 (Ex. 6, pp. 4-5 of Arrest Report containing Vincent Ray's statement). Kolatski's recounting of Mullarkey's allegations thus contained information that was pertinent to the investigation of Vincent Ray as well as pertinent to any investigation of the chief or deputy chief.

For these same reasons and one more, Morales' statements to the prosecutor about Mullarkey's allegations and the course of the Vincent Ray investigation were similarly pertinent to both the Vincent Ray investigation and any other investigation of the chief or deputy chief. The prosecutor would certainly want to know about any contact between Vincent Ray and his sister or deputy chief while police looked for him on the warrants. Furthermore, this information

was pertinent to the missing report and accounting for it to any criminal defense attorney who may appear on Vincent Ray's behalf. *Morales*, 494 F.3d at 597 (Petitioners' Appendix, p. 15). Lastly, but perhaps most significantly, as a practical matter, the public would expect Morales as part of his duties as a police officer to inform proper authorities such as the county's prosecutor of serious allegations of criminal conduct lodged against any law enforcement officer, whether a superior or not.

The dissimilar facts of *Freitag* and this case account for the conclusion that the ninth and seventh circuits have consistently and properly applied the "official duties" test of *Garcetti* to reach opposite yet correct conclusions about the application of the First Amendment to speech at issue in the two cases. Kolatski and Morales have also failed to demonstrate that the seventh circuit misunderstood the test and applied it too broadly here or that it or other courts have done so in any other case. In fact, a review of the opinion below reveals that the seventh circuit correctly analyzed and applied the test to these instances of their speech to conclude that these statements were a part of their "official duties."

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari filed by David Kolatski and Alfonso Morales.

Respectfully submitted,

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